No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CAROL M. PARKS, an Individual and as Natural Mother, Guardian and Next Friend of JACK BERCAW "CORKY" WILLIAMS,

Petitioner,

-Against-

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS FOR THE

ELEVENTH CIRCUIT.

APPENDIX

Petitioner's counsel of record:

Marden G. Dixon
1900 N. Canyon Rd.
Suite 304
Provo, Utah 84604
Telephone (801) 377-7773

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CAROL M. PARKS, an Individual
and as Natural Mother, Guardian
and Next friend of JACK BERCAW
"CORKY" WILLIAMS,

Plaintiffs,

vs. PCA 79-0431

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION

On October 13, 1973, Carol M. Parks, then known as Carol Williams, gave birth to a son, Jack Bercaw "Corky" Williams, at the Naval Hospital, Naval Air Station in Pensacola, Florida. Approximately eight months later, in June of 1974, Corky was diagnosed as suffering from cerebral palsy. Cerebral palsy is a type of brain injury causing physical impairment. As a result of cerebral palsy Corky is a

triplegic, meaning he has major paralysis in three of his four extremities.

In February of 1979, Carol M. Parks,[1] on behalf of Corky, brought an action for damages alleging Corky's injuries resulted from negligence on the part of the physicians and nurse practitioners who examined and cared for her during pregnancy and who assisted in the labor and delivery of Corky.[2]

Jurisdiction is vested in this court by virtue of 28 U.S.C. 1346(b) et. seq.

At trial there was testimony from Mrs. Williams, and from the physicians and nurse practitioners who were involved in the birth of Corky, and in post-delivery care. In addition, there was testimony from expert medical witnesses, including some midwives. Some of these witnesses actually examined Corky after his cerebral palsy was diagnosed and others testified on the basis of evidence

in the record. Some of the experts who testified are recognized as leading authorities in their fields.

Plaintiffs' contention is that Corky suffered brain injury as a result of lack of adequate oxygenation of his brain during labor and delivery. This condition is termed hypoxia.

Hypoxia in a fetus during labor and delivery is a known cause of cerebral palsy. Plaintiffs contend the physicians and nurse practitioners failed to recognize various prognosticators of this condition existing during pregnancy, labor and delivery. The evidence presented at trial established that certain remedial procedures, which were not undertaken here, may alleviate the danger caused by hypoxia.

There is no dispute that Corky has cerebral palsy. There is also agreement

that the cerebral insult which caused cerebral palsy occurred sometime during pregnancy. It further appears, by the preponderance of the evidence, that, if the cerebral insult took place during the period of labor and delivery, it resulted from hypoxia.

Beyond that, however, there is a sharp conflict in the medical evidence whether the cerebral insult occurred during labor and delivery, whether hypoxia caused the cerebral insult, and whether those in charge of and managing the pregnancy, labor and delivery either caused or failed to prevent the injury to Corky.[3] Compounding the problem presented by the conflict in medical evidence is the fact that a great many, if not a majority, of the causes of cerebral palsy are unknown.

Testimony at trial revealed that some of the known causes are hypoxia,

infections and viruses. Yet, even among the known causes, it is often extremely difficult to pinpoint the exact time when such cause arose.

In post-trial memoranda, the parties have extensively briefed and argued this case. They point out what are to them various discrepancies and inconsistencies in testimony, argue strenuously that, for various reasons, their evidence is believable, and contend the preponderance of the evidence supports their respective positions.[4]

While all contentions and arguments between the parties are not specifically discussed in this memorandum decision, all of them have been considered by the court in arriving at its conclusions.

Plaintiffs contend there was hypoxia during delivery and birth and that it resulted from a number of factors.

They contend Mrs. Williams suffered from a condition known as preeclampsia or toxemia. Preeclampsia creates a danger to the fetus by impairing the function of the placental transfer of oxygen to the fetus and imposes a risk of hypoxia.

Under the evidence there are three recognizable signs of preeclampsia. These are hypertension (elevated blood pressure), edema (excessive weight gain) and proteinuria (protein in the mother's urine).

While there was not unanimity of the witnesses on this point, it does appear from the preponderance of the evidence that a diagnosis of preeclampsia should be made if the mother has hypertension plus the presence of either edema or proteinuria.

Testimony at trial focused on whether Mrs. Williams had hypertension and edema. The medically trained

witnesses, however, were not able to agree on even the criteria for recognizing hypertension or edema. For example, it is necessary to establish the mother's blood pressure baseline in order to determine if the blood pressure is elevated. There was disagreement over Mrs. Williams' blood pressure baseline. Further, assuming a baseline could be established, there was conflicting testimony on how one determines the blood pressure is elevated and on how long the blood pressure must remain elevated. As to edema, it was apparent that some degree of edema is common in pregnant women and the evidence was inconclusive whether Mrs. Williams' weight gain during pregnancy could be diagnosed with reasonable medical certainty as edema indicating preeclampsia.

Before this court there was

presented credible believable evidence supporting findings of preeclampsia, of no preeclampsia, and of preeclampsia so mild that it would not indicate an injurious condition. The evidence submitted precludes a finding that it appears from the preponderance of the evidence preeclampsia existed.

In addition to contention [sic] respecting preeclampsia, plaintiffs submit additional risk factors were present and contributed to the end result.

Two of these factors relate to the length of pregnancy and delivery.

Plaintiffs argue Corky was a post-date baby and that, as a result, the placenta was not functioning at the end of pregnancy as well as it would have if Corky had been born sooner. They contend that the placenta's ability to transfer oxygen and nutrients was decreased and, thus, contributed to the cause of hypoxia

in Corky.

However, if Corky was post-date, it was probably only by one day and, because the date of conception is often not absolutely certain, from the evidence, he may not have been post-date at all. Furthermore, the evidence was inconclusive whether this placenta had, in fact, deteriorated.

Plaintiffs also contend the prolonged second stage of labor was a contributing factor to hypoxia.

Although, under the evidence, the second stage of labor may have been longer than normal, and perhaps should have been cause for concern, there was credible evidence from witnesses for defendant that Corky had a spontaneous birth and that such negated any possible complications arising from the length of labor. Again, the credible, believable

evidence is in such conflict that it cannot be said it appears from the preponderance of the evidence that there was a prolonged second stage of labor which reasonably should have been recognized and could have been avoided and that the failure to do so was a contributing factor to hypoxia and to Corky's injury.

Another risk factor presented by plaintiffs concerns the frequency and length of contractions during labor. When the uterus contracts, the blood supply to the fetus is either reduced substantially or completely cut off. The fetus must, therefore, obtain the oxygen and nutrients supplied by blood between contractions. A more frequent and longer contraction rate lessens the necessary renourishment period.

Under the evidence there is a possible risk from lengthy contractions.

However, there was total disagreement among witnesses testifying whether Mrs. Williams' contractions were abnormal. The conflicting evidence once again precludes a finding that it appears from a preponderance of the evidence the contractions were a contributing cause of Corky's injury.

The position of plaintiffs is not only that all these risk factors existed, but also that there was negligence resulting from a failure to recognize these factors.

The principal method under the evidence of determining fetal distress is by listening to the fetal heart rate. A fetal heart rate between 120-160 is considered normal and a reading below 120 raises the possibility of late deceleration. Late deceleration in the fetus means the heart rate is going up

and down and indicates the fetus is in distress and undergoing trauma of some sort.

Only five fetal heart rates were recorded during Mrs. Williams' labor and the last three readings were all at 120 beast per minute. Although plaintiffs contend that the heart date readings at 120 may not have been accurate, there is no evidence that they were not accurate. Furthermore, the heart rate dropped to 120 and stayed there. Under credible evidence submitted, these readings did not exhibit what one would expect if late deceleration existed.[5]

Thus, there is not sufficient basis under this evidence to justify a conclusion that it appears from the preponderance of the evidence the nurse practitioner should have assumed arrest in labor or late deceleration was occurring during labor and that the fetus

was in distress.

The evidence discussed so far relates to manifestations of hypoxia before Corky was born. At trial considerable additional testimony concerned Corky's condition after birth and later when cerebral palsy was diagnosed. It is, of course, plaintiffs' burden to establish, by the preponderance of the evidence, not only that defendant was negligent, but also that negligence was the legal or proximate cause of injury.

Under the evidence, the condition of a baby is determined within minutes after birth by calculating an "Apgar Score" which assesses the heart rate, respiratory effort, muscle tone, reflex, irritabilty and color. Although the Apgar Score measures relatively objective criteria, it is necessarily a subjective

test and can vary, depending on the evaluator.

Under the evidence, a possible Apgar Score ranges from 1 to 10 with 10 being the best score.

In this case Corky's Apgar Score was recorded as 8. Virtually every witness gave his or her opinion whether an Apgar Score of 8 was correct and what it meant in terms of hypoxia during labor and delivery. Some thought the score was correct, others thought it should have been lower. Some said a score of 8 meant injury occurring during labor was "inconceivable," others said a high Apgar Score does not rule out injury during labor.

The lack of consensus impels the conclusion by this court that, despite the medical value of an Apgar Score, it is of little probative value for the purpose of this decision.

There was evidence presented in this case respecting results of examination of Corky after he was born and after cerebral palsy was diagnosed. These studies are not determinative of the cause of injury. However, they reveal significant clues in regard to the question when the injury may have occurred.

The type of brain damage Corky suffered is relevant because it may indicate what stage in the development of the fetus injury occurred.

Two of defendant's expert witnesses stated that Corky had a deep-grained lesion which meant to them that the damage was done at a point in time much earlier than labor and delivery. In support of their opinions, both witnesses noted that Corky's head size was small in proportion to his body length, indicating

the insult to the brain earlier in pregnancy prevented the head from growing at the same rate as the rest of the body. Although neither witness was able to determine the cause of brain injury, both were certain that it did not occur during labor and delivery. Their testimony was credible and believable.

However, a witness for plaintiffs came to virtually the opposite conclusion. Based on his examination of Corky, he found that the brain damage was consistent with hypoxic trauma occurring very late in pregnancy, probably during labor and deliver. The opinion of this witness was that tests conducted ruled out every known cause of cerebral palsy other than hypoxia. He agreed, if injury occurred early in pregnancy, the head size would be small, but stated the size of Corky's head was normal at birth.

His testimony was also credible and

believable. Again, there is a standoff in evidence - it does not appear from the preponderance of the evidence that the conclusion and opinion of defendant's witness is correct.

As mentioned previously, various witnesses testified in regard to Corky's condition immediately after birth. However, additional testimony focused on Corky's condition after he was brought to the nursery following delivery.

There was evidence to the effect that, if the cerebral insult occurred immediately prior to birth, manifestation of such trauma would become apparent during the course of the child's hospital stay. The most obvious manifestations would continue for at least 12 hours after birth. There was some evidence that Corky did not suck well and may have been lethargic. However, it does not

appear from the evidence that Corky had the degree of depression that one would expect in a child who had hypoxia during labor and delivery.

Plaintiffs contend that under the evidence Corky was born with a very, very molded head and there is some evidence to that effect. Yet a doctor examining Corky following birth stated that the molding was so slight that he attached no significance to it.

In fact, the physician, Dr. Jones, did a new born examination of Corky 3 or 4 hours after birth and found him to be normal with no indication that there had been hypoxia during labor and delivery.[6]

Again the evidence presented in this respect is insufficient to justify a conclusion that it appears from a preponderance of the evidence Corky's cerebral palsy was caused by hypoxia occurring during labor and delivery.

Various other possible causes of cerebral palsy were mentioned during trial, including an automobile accident that Mrs. Williams was involved in early in her pregnancy with Corky. However, it is neither necessary nor possible for the court to decide, under the evidence here, how cerebral palsy resulted. The most that can be said is that the cause of Corky's cerebral palsy is unknown and, with that conclusion, it is apparent plaintiffs have not carried their burden of proof.[7]

The nurse practitioner in attendance at birth was CMDR. Betsch. There are some factual inconsistencies and discrepancies between her testimony and that of Mrs. Williams.

Mrs. Williams was under some sedation and in labor. Her testimony is somewhat suspect. As an example, she

testified that someone pushed on her abdomen during labor, a practice that, from the evidence, is not good practice and may cause damage. From all the evidence, this court concludes Mrs. Williams was in error in this regard.

CMDR. Betsch's testimony is also somewhat suspect. She, understandably, had no personal recollection of this delivery and, while she testified positively in some respects, her testimony had to be based largely on her customary practice. There were some contradictions in her testimony. In addition, there was not kept a complete record of birth that, under the evidence, should have been kept. Nevertheless, CMDR. Betsch was experienced and, to some extent, her testimony was corroborated by others involved during birth and afterwards. Some important records that were kept were also corrobative in

respects of her testimony.

Beyond that, the contention presented is that there was hypoxia during birth which should have been recognized and that called for care beyond that normally required. There is no contention that, assuming this labor and delivery to have been normal, the care provided, nonetheless, negligently produced injury.

As pointed out in this decision, it does not appear from a preponderance of the evidence that there was hypoxia during birth or that the delivery was other than a normal delivery.

It follows that it does not appear from the preponderance of the evidence that the care provided at birth by CMDR. Betsch, and others, was negligent with Corky's cerebral palsy being the proximate result of such negligent care.

Plaintiffs advance two legal arguments in their memorandum.

Labelling their contention as the "Value of a chance Doctrine," they contend that if negligence of a defendant reduces the possibility of a better outcome, or otherwise reduces the plaintiff's chances, the defendant can be held liable.

In so contending they have to extent placed their own construction upon the cases they cite. Beyond that, however, under the cases there must be found neligence before the contention, dealing as it does with proximate cause, can come into play. As pointed out in this decision, it does not appear from the preponderance of the evidence in this case that there was here negligence of the defendant or that there was a negligent failure of compliance with the usual standards of medical care that was

or might have been a proximate cause of injury.

Plaintiffs also contend that the government negligently failed to keep proper medical records with the plaintiffs' ability to prove causation thereby being affected and that such negligence on the part of the government relieves the plaintiffs of the burden of proof in this respect, or at least should shift that burden to the defendant.

Plaintiffs cite several cases which, as defendant points out, deal with situations not involving medical records and do not appear to have relevance here. The closest case to being on point, cited by plaintiffs, was a "spoilation of records" case where the physician could not locate the original records because they had been destroyed. The court in that case placed the burden on defendant

to prove that his negligence was not the cause of injury. Thor v. Boska, 38 Cal.App. 3d 558, 113 Cal. Rptr. 296 (3d Ct.App. 1974).

The rationale of the Thor case appears to be that, where there is a substantial probability that defendant's negligence was a cause of an injury and the defendant's negligence makes it impossible for the plaintiff to prove causation, the burden should shift to the defendant, Implicit in any such holding is that the defendant's failure or refusal to produce a record, or the destruction of it, raises some inference of guilt. 2 Wigmore, Evidence 291 (Chadbourn rev. 1979).

Assuming arguendo this holding presents viable law in Florida, there is here presented no similar factual situation. There does not appear from a preponderance of the evidence there is a

substantial probability that there was negligence on the part of the defendant that was a cause of injury. Moreover, there was no failure or refusal to produce records or any destruction of them. Under the evidence, the records that were available were produced and were not destroyed or discarded to prevent their being used in evidence. Under the factual situation here presented, this court has neither the inclination nor the right to place on defendant the burden of proof that rightfully belongs on plaintiffs.

The real question is not whether proper records were kept but whether proper actions were taken. There was placed in evidence the testimony of those in actual attendance at birth. They were fully examined and cross-examined. As pointed out herein, it does not appear

from the preponderance of the evidence that they were guilty of medical malpractice constituting negligence that was a proximate cause of injury.

Overall, and in summary, there is credible, believable evidence that Mrs. Williams had hypoxia during labor causing Corky's cerebral palsy and that reasonable careful management would have resulted in its detection with injury being avoided by available medical procedures. There is equally credible, believable evidence that Mrs. Williams did not have hypoxia during labor and that Corky's cerebral palsy resulted from some cerebral insult prior to labor, with its cause being unknown, and with there being no evidence it was caused by negligence of the government.

There is no evidence, nor do plaintiffs contend, that, if cerebral insult was suffered prior to labor, the

defendant is liable for injury resulting from it.

With the evidence so evenly balanced, plaintiffs may not prevail. They have not carried the burden upon them of showing liability of defendant by a preponderance of the evidence.

Judgment will be entered in favor of the defendant and against the plaintiffs with costs taxed against the plaintiffs.

DATED this 22nd day of January, 1981.

/s/
WINSTON E. ARNOW Chief Judge

FOOTNOTES

1In this decision, because Mrs. Parks was referred to by her prior name at various times, references are made under her former name of Mrs. Williams.

under her former name of Mrs. Williams.

[2]The Navy trains Navy nurse practitioners to deliver babies. Although nurse practitioners function in a manner similar to that of a midwife, nurse practitioners are not certified nurse midwives. Pertinent Navy regulations required a physician to be on call for all deliveries and nurse practitioners are not to manage complicated or high risk patients alone.

Both physicians and nurse practitioners examined and cared for Mrs. Williams during her pregnancy with Corky. A physician was on call during labor and delivery. However, only nurse practitioners were present at that time.

Despite the fact that a physician did not participate in this labor and delivery, the applicable standard of care is that of a fully trained obstetrician, rather than that of a nurse practitioner.

[3]There is one conclusion that may be properly considered as established by the evidence, and it may be phrased as follows:

Notwithstanding the tremendous advances made in medical knowledge, the field of medicine is still such an uncertain science that, in a case of this nature, knowledgeable experts can entertain and have completely divergent opinions.

[4]This court did not anticipate, and so initially put no limit on, the length of memoranda to be filed. Plaintiffs started the ball rolling by submitting a 191-page memorandum and defendant submitted, in response, a 69 page memorandum. Plaintiffs, after their

memorandum was filed, were required by the court to limit their reply memorandum to 25 pages of standard typographic printing. They so limited, but did so in noticeably smaller typing and page margins.

[5]Plaintiffs contend that it is an "old fashion standard" to consider a fetal heart rate between 120-160 as normal and that late decelerations may exist even if the heart rate is within that range; defendant argues to the contrary. Again, there is a substantial conflict in the evidence.

[6]In memoranda, plaintiffs' counsel, in zeal of advocacy have regrettably made what are to this court some unfounded assertions. In memoranda, defendant's attorney has, understandably, taken umbrage at some of them.

Respecting this witness, for example, plaintiffs' counsel say Dr. Jones obviously had to be sloppy in his practice and either did not recognize abnormalities which were noted or neglected to follow through and was inexperienced. While Dr. Jones did not have the experience of others testifying, he impressed the undersigned as being capable, credible and believable.

[7]To this layman judge, Capt. Meriwether's suggestion that in the automobile accident Mrs. Williams' abdomen may have come forcibly in contact with the door handle of the car, resulting in cerebral insult, possesses plausibility. But it was more or less speculation on her part, and other experts, though not questioned extensively regarding that possibility,

did not believe it was probable that the accident played a part in Corky's cerebral palsy.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5315

CAROL M. PARKS, an Individual and as Natural Mother, Guardian and Next Friend of JACK BERCAW "CORKY" WILLIAMS

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Florida

---

(August 9, 1982)

Before TUTTLE, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

The judgment is affirmed on the basis of the memorandum decision of Honorable Winston E. Arnow, District Judge, dated January 22, 1981.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-5315

CAROL M. PARKS, an individual and as Natural Mother, Guardian and next Friend of JACK BERCAW "CORKY" WILLIAMS,

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA

Defendant-Appellee,

Appeal from the United States District Court for the Northern District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 9, 11 Cir., 1982, F.2d).

(October 5, 1982)

Before TUTTLE, RONEY and KRAVITCH, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

REHG-6